instead of the 14% asked for by the respondent. He gave his reasons at page 10 of the judgment (pg. 141 of record) and we think it is a proper exercise of his discretion. He never imposed interest on a day to day basis.

Finally to clear the doubts created by the arguments between counsel while on the last ground of appeal. We would like to state that it is unjustified to read Rule 12(1) (r) to require interest to be paid on a daily rest basis. It is not only impractical and cumbersome from the point of view of easy calculation but it is also not justified on the language of the Rule. The words used are "day to day" and as stated earlier these words are merely to emphasise the period for calculation of the indemnity. If interest on daily rest basis is intended by the Rule a clearer provision would have been made as such provision would impose a heavier burden on the developer.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *S.A. Lingam & Co.; Asbir, Hira Singh & Co.*

IN RE PANG PO PAH

[R. Cr. J. (Wan Yahya J.), April 29, 1982]

[Malacca – Criminal Revision No. 1 of 1982]

Criminal Law and Procedure – Preliminary enquiry – Duty of Magistrate at – Whether magistrate empowered to commit accused for trial at High Court on charge other than tentative charge – Criminal Procedure Code (F.M.S. Cap. 6) ss. 140 & 141.

Criminal Law and Procedure – Charge – Whether magistrate empowered to commit accused for trial at High Court on charge other than tentative charge – Meaning of "some other Magistrate" in Criminal Procedure Code (F.M.S. Cap. 6), s.140(i)(b) – Whether includes President, Sessions Court.

Jurisdiction – Duty and power of Magistrate at preliminary enquiry – Criminal Procedure Code (F.M.S. Cap. 6), ss. 140, 141 & 177 – Penal Code, s. 304.

On October 21, 1981, pursuant to a preliminary enquiry into an offence of murder under section 302 of the Penal Code, the learned Magistrate at Melaka, purporting to act under Chapter XVII of the Criminal Procedure Code, committed the accused for trial at the High Court not on the tentative charge of murder, as framed by the prosecution, but on a lesser charge under section 304 of the Penal Code. The prosecution felt that the Magistrate had acted in excess of the power conferred by sections 140 and 141 and applied for revision.

Held: (1) an examining Magistrate in a preliminary enquiry may frame charges on any offences triable in the High Court as he finds in the evidence and he may depart from the tentative charge as submitted by the prosecution;

(2) the learned Magistrate may, when the preliminary enquiry evidence discloses an offence triable by a Sessions Court, frame a charge for that offence and, in accordance with section 14(i)(b) read with section 177, transfer the case to be tried by a President of the Sessions Court;

(3) in the present case the learned magistrate had acted improperly by committing a case not ordinarily triable by a High Court to this court for trial;

(4) a *prima facie* case of murder under section 302 of the Penal Code had been made out at the enquiry. The order of the Magistrate should therefore be set aside and he be directed to draw a charge under section 302 of the Penal Code against the accused and to commit the accused for trial to the High Court.

Cases referred to:

1. *Mohamed Kunju* v. *Public Prosecutor* [1966] 1 M.L.J. 271.
2. *R.* v. *Rider* [1954] 1 All E.R. 5, 6.
3. *Goh Swee Joo & Ors.* v. *Public Prosecutor* [1962] M.L.J. 29.
4. *Tan Kim Kang & Ors.* v. *Public Prosecutor* [1962] M.L.J. 388, 389.

CRIMINAL REVISION.

C. W. Chan (Deputy Public Prosecutor) for the Public Prosecutor.

F.H. D'Cruz for the accused.

Cur. Adv. Vult.

Wan Yahya J.: On October 21, 1981, pursuant to a preliminary enquiry into an offence of murder under section 302 of the Penal Code, the learned Magistrate at Melaka, purporting to act under Chapter XVII of the Criminal Procedure Code, committed the accused person for trial at the High Court not on the tentative charge of murder, as framed by the prosecution, but on a lesser charge under section 304 of the Penal Code. The learned Deputy Public Prosecutor, who felt that the Magistrate had acted in excess of the powers conferred by sections 140 and 141, made this application for revision.

At the hearing before this court it was contended by the Deputy Public Prosecutor that section

140 merely empowers the examining Magistrate to either commit the accused person to trial at the High Court or to discharge him, or, if the evidence discloses an offence which was within his jurisdiction to try, he may proceed to try the case summarily or order him to be tried before another Magistrate. Counsel for the accused person thought otherwise. He is convinced that the Magistrate possessed complete liberty to commit the accused to trial to the High Court on whatever charge.

The relevant powers of a Magistrate in a preliminary enquiry are contained in Chapter XVII of the Criminal Procedure Code, the relevant sections of which read as follows:

"139. (i) When the accused person is brought before him the Magistrate shall proceed to hear the case for the prosecution and to take all such evidence as may be produced in support thereof and such other evidence as the Magistrate may think fit to call for.

140. (i) When the evidence referred to in the last preceding section has been taken the Magistrate shall if he finds that there are not sufficient grounds for committing the accused person for trial discharge him, unless it appears to the Magistrate that such person should be tried before himself or before some other Magistrate in which case he shall either –

(a) forthwith frame a charge or charges in writing and call upon the accused to plead thereto; or

(b) order the accused to be tried before some other Magistrate.

(ii) If the Magistrate takes action under paragraph (a) of subsection (i) the case shall proceed as a summary trial, provided that –

(iv) When the Magistrate is of opinion that there are peculiar difficulties or circumstances connected with the case or whenever he shall be so directed by the Public Prosecutor he shall remand the accused or admit him to bail and shall forthwith transmit the depositions to the Public Prosecutor in order that he may give such instructions as to him shall appear requisite.

141. (i) If after taking the evidence for the prosecution the Magistrate is of the opinion that on the evidence as it stands there are sufficient grounds for committing the accused for trial he shall frame a charge under his hand declaring with what offence or offences the accused is charged.

142. (i) If the accused elects to reserve his defence he shall forthwith be committed for trial before the High Court.

(ii) If the accused elects to make his defence before the Magistrate the statement made by the accused, if any, shall be taken down in writing and read over to him and shall be signed by such Magistrate and kept with the depositions and transmitted with them as hereinafter mentioned.

143. When the evidence referred to in the last preceding section has been taken the Magistrate shall –

(a) if he finds that there are not sufficient grounds for committing him for trial discharge the accused;

(b) if he finds that there are sufficient grounds for committing him for trial commit the accused for trial before the High Court."

Now sections 139 and 140 deal with a situation where there are insufficient grounds to commit the accused person for trial to the High Court, whilst sections 141, 142 and 143 lay down the procedure to be followed when the *prima facie* evidence of the prosecution warrants committal of the case to the High Court.

Although the point taken up by the learned Deputy Public Prosecutor in this proceeding relates only to the question of legality to frame charges other than the one tendered by the prosecution, it would be desirable at this juncture to deal with the following questions commonly encountered by the Magistrates when conducting preliminary enquiries, *viz:*

(i) Whether the Magistrate is empowered to commit the accused person on a charge other than the one tentatively placed before him by the prosecution at the commencement of the enquiry;

(ii) Whether the accused in this case has been properly committed to stand trial at the High Court under section 304 of the Penal Code;

(iii) The option available to an examining Magistrate where the offence disclosed in evidence at the preliminary enquiry is neither triable by him summarily nor by the High Court.

The answer to the first question (i) is obvious from the wordings of section 141 itself, which employs the term that a magistrate should frame "a charge" instead of the term "the charge" or "the charge as tendered by the prosecution." Further on in the same section the term "declaring with what offence or offences" implies the option given to the Magistrate to frame a charge in accordance with the type of offence which he may find in the evidence.

The procedure to be adopted in a preliminary enquiry as laid down in Chapter XVII of the Criminal Procedure Code does not provide for a charge to be framed and tendered by the prosecution; neither does it provide for such charge to be read out to the accused at the commencement of the enquiry. All it says is that the Magistrate should hear the case for the prosecution and then only decide whether to draw a charge, charges or dis-

charge the accused person without making any charge at all. If the framers of the Code had intended otherwise, some mention of a charge being framed or tendered by the prosecution would have in the least been made in that chapter.

A tentative charge submitted to the Magistrate by the officer assisting in the conduct of a preliminary enquiry is not a formal charge. It is a mere reflection of the offence the prosecution has in mind the accused has committed. It does not confine the examining Magistrate to enquiring into the offence stated therein alone and neither does it restrict or limit such Magistrate's power to draft a charge or charges on whatever offences (preferring, of course, the more to the less serious ones), which, according to his judicial findings, is or are disclosed in the evidence; but if he commits the accused to stand trial in the High Court, the committal must however be on an offence ordinarily triable by that court. In *Mohamed Kunju* v. *Public Prosecutor*[1] Raja Azlan Shah J. (as he then was) cited with approval the following passage from *R.* v. *Rider*[2] at page 6:

"I have come to the conclusion that the proper construction to put on the word 'charge' is that a man is charged before a court which has jurisdiction to determine the matter in question ... But if justices commit a man for trial, they are not adjudicating on the case. The only thing they determine is whether there is a *prima facie* case to answer, and, if they think there is, they commit the accused. He is then brought before the court at assizes or quarter sessions on indictment, and it seems to me that then, for the first time, he is before a court having jurisdiction to determine the matter."

It is obvious from the above that the tentative charge usually submitted before the commencement of a preliminary enquiry is not a formal charge but merely an accusation of a probable offence and as such is not legally binding on the scope or extent of the examining Magistrate's enquiry.

The role of an examining Magistrate in a preliminary enquiry was discussed by Hashim J. in *Goh Swee Joo & Ors.* v. *Public Prosecutor*[3] and more particularly in *Tan Kim Kang & Ors.* v. *Public Prosecutor*[4] wherein His Lordship said at p.389:

"Section 141 of the Criminal Procedure Code read together with section 142, in my opinion, would simply mean that all a Magistrate at a preliminary enquiry has to do is to see whether there is any evidence of any offence which is triable in the High Court and if there is he is duty bound to commit the accused person for trial."

Putting it in other words, an examining Magistrate is duty bound to commit an accused person to stand trial for the seriousmost offence or offences which, according to his judicial finding, is ordinarily triable in the High Court. It does not matter if that offence falls short of the expectation by the prosecution so long as it is one ordinarily triable by a High Court.

My answer to the point (ii) above is that the accused has not been properly committed to attend trial in this Court. As discussed earlier, an examining Magistrate may commit to trial an accused person charged with an offence ordinarily triable in the High Court. Before the amendment to the Subordinate Courts Act by Act A 434/78 it was proper for a Magistrate to commit a person for trial under section 304 of the Penal Code but, as from July 1, 1978, section 304 has been placed within the jurisdiction of the Sessions Court and therefore is no longer a case ordinarily triable in the High Court. I am mindful of the fact that in appropriate circumstances the High Court may summarily hear and dispose of cases triable in the lower courts, but that is an exception rather than the rule and is exercisable only under particular circumstances. If a Magistrate is freely allowed to commit any case not triable by him to this court, then the High Court may find itself heavily encumbered with the burden of disposing of cases triable by Courts of inferior jurisdiction.

This brings me to the third point and that is, what option has a Magistrate when the evidence introduced by the prosecution discloses, according to his judicial finding, an offence triable ordinarily in the Sessions rather than the High Court.

Section 140(i)(b) in effect states that he may transfer the case to be summarily tried by some other Magistrate. The Criminal Procedure Code is silent on the jurisdictive authority of this other Magistrate. It was suggested at one point during the hearing that the term will not include a President of the Sessions Court. The Sessions Court is a creation of the Subordinate Courts Act, 1948, but is only mentioned briefly in the definition of 'Court'. The term 'President Sessions Court' is never referred to specifically. However, there is no doubt that the procedures as provided by the Code are generally applicable by virtue of section 7 of the Criminal Procedure Code to the Sessions Court, as they do to all courts exercising criminal jurisdiction. When the Criminal Procedure Code was framed, the division of jurisdiction was one between the Magistrate's Court and the High Court

only. What was not triable by a Magistrate's Court then was triable by a High Court and conversely offences which were not summarily triable by a High Court were those over which the Magistrate's Court had jurisdiction to try. I am of the view that the same division of jurisdiction applies when considering section 140 of the Code with the Magistrate's Court and Sessions Court being grouped together as Subordinate Courts on one side and the High Court on the other. Offences which are not summarily triable in the High Court are triable in the Subordinate Court, *i.e.*, the Magistrate's Court and the Sessions Court. The overall object of sections 140, 141 and 142 is to enable the Magistrate to do one of these three things, *i.e.*, either to discharge the accused person, or to commit him to trial to a High Court, or to try the case summarily. To transfer a case to the Sessions Court is tantamount to having the case tried summarily. I am of the firm view that this is the intention of the framers of the Code. The term 'some other Magistrate' must be read to include the President of the Sessions Court if their intention is to be effective. The object of section 140 is not only to enable a Magistrate to commit an accused person to trial in the High Court for an offence triable therein but also where he finds no High Court case for committal, to take cognizance and to proceed to try other offences triable even by the courts of lowest jurisdiction. It would be absurd in that case to say that the legislature did not intend that he should take steps to initiate proceedings against Sessions Court cases when it sanctions him to do so in the case of offences punishable in the Magistrate's and High Courts, *i.e.*, Courts of the lowest and highest jurisdiction. To construe otherwise would only lead to the absurd position of having a class of offences which a Magistrate is cognizant of but in respect of which he is not sanctioned to proceed with. I would therefore hold that the term 'some other Magistrate' in section 140(i)(b) will include a President Sessions Court.

By analogy I find some support for this proposition from the addition by way of amendment in section 303A, which reads:

> "303A. Any reference in this Chapter to a Magistrate and a Magistrate's Court shall be deemed to include a reference to a President of Sessions Court, or a Sessions Court, as the case may be; and the expression "Magistrate" and "Magistrate's Court" shall be construed accordingly."

Likewise I find the provision in section 177 enabling a Magistrate to transfer a case which, in his opinion, ought to be tried by "some court of higher jurisdiction than his own" as an indication of the intention of the legislature to enable cases which are not triable by a Magistrate to be tried by the President Sessions Court summarily without having to resort to the powers of the High Court.

To sum up briefly the rulings I would say:

(i) An examining Magistrate in a preliminary enquiry may frame charges on any offence triable in the High Court as he finds in the evidence and he may depart from the tentative charge as submitted by the prosecution.

(ii) In the matter before us the learned Magistrate had acted improperly by committing a case not ordinarily triable by a High Court to this court for trial.

(iii) He may, when the preliminary enquiry evidence discloses an offence triable by a Sessions Court, frame a charge for that offence and, in accordance with section 141(i)(b) read with section 177, transfer the case to be tried by a President, Sessions Court.

Having dealt with the various points involved I will now turn to the facts and nature of this enquiry itself. The duty of a Magistrate in a preliminary enquiry is to determine from the evidence presented to him by the prosecution whether a *prima facie* case exists to warrant an order of committal for trial to the High Court being made against the accused person. When doing so it is not part of his duty to weigh the evidence as if he was himself trying the case, or to deliberate upon and make appraisal of the prosecution witnesses' testimony as against the defence counsel's submission, nor is he expected to contemplate the accused's possible lines of defence. Once the bare ingredients of any offence triable by the court of a Judge has been presented to him, his duty is to make the order of committal and not usurp the more intricate duty of assessing the credibility of facts from the body so authorized to perform that function, *i.e.*, the jury.

Perhaps in his eagerness to drive home what he considers to be an important point of law, the learned Deputy Public Prosecutor overlooked to present any appreciable submission on the matter just stated. The duty of a Judge sitting in his revisionary capacity is not confined to matters raised by the parties alone. He may in appropriate circumstances pry into the deeper aspects of the case so as to ensure that substantial justice subsists not only between the accused and the accuser but also between the accused and others who might suffer from his lethiferous deed.

According to the records, there exists unimpeached evidence of the prosecution witnesses

to show that the accused pursued the deceased over a considerable period and stabbed him with a pair of scissors and from this injury the victim died. The evidence on this, to my mind, is sufficient for the Magistrate to commit the accused to trial on the charge of murder.

It appears to me that the learned Magistrate in this case was labouring under a misapprehension as to his duty when functioning as a Magistrate in a preliminary enquiry.

I am of the opinion that a *prima facie* case of murder under section 302 has been made out at the enquiry and for that reason I set aside the order of the Magistrate and direct him to draw a charge under section 302 of the Penal Code against the accused and to commit him for trial to the High Court.

Order accordingly.

Solicitors: *Tay Leong Siak & Co.*

ROSLAN BIN HAJI YAHYA v. PUBLIC PROSECUTOR

[R.Cr.J. (Gunn Chit Tuan J.) February 28, 1984]

[Kuala Lumpur – Selangor Criminal Revision No. 1 of 1984]

Criminal Law and Procedure – Sentence – Police Supervision – Discretion – Criminal Procedure Code (F.M.S. Cap. 6), s. 295 (i).

In this case the accused had pleaded guilty to the offence of theft of household crockery from his father's house. Accused was a drug addict. He had previously been convicted of theft of his father's wrist watch and sentenced to attend the drug rehabilitation centre.

The accused was sentenced to two years' imprisonment to be followed by one year's police supervision. The accused's father wrote to complain that the sentence was excessive.

Held: (1) neither the facts of this case nor the past record of the accused justified the order for police supervision;

(2) the power to impose police supervision should be sparingly resorted to and only in the most appropriate cases;

(3) the order for police supervision in this case should be set aside.

Case referred to:

(1) *Re Bakar bin Ahmad* [1959] M.L.J. 256.

CRIMINAL REVISION.

Appellant in person.

Phang Ah Hee (Deputy Public Prosecutor) for the Public Prosecutor.

Gunn Chit Tuan J.: The accused in this case was convicted of theft in a dwelling house under section 380 of the Penal Code. The facts, as admitted by the accused and accepted by the Magistrate, were that the accused was seen by his younger sister, the complainant in this case, looking for something in their house at about 9.00 a.m. on March 26, 1983. Later that day the complainant also saw her elder brother, that is the accused, leaving the house carrying a bundle wrapped with a piece of newspaper. The complainant suspected that there was a plate in the bundle and on checking their household crockery found that several plates were missing. She suspected that her brother must have taken those plates together with other pieces of crockery which were found missing. The total value of the crockery missing was about $30/- and as the complainant was afraid that the accused, who was a drug addict, must have sold the crockery, she went to the police station to make a report.

Two days later after investigations by the police the accused was arrested and the police recovered the missing plates and other pieces of crockery from three Malay women who had bought them from the accused. The accused pleaded guilty to a charge under section 380 of the Penal Code and was sentenced by the Magistrate's Court Rawang on May 14, 1985 to two years' imprisonment with effect from the date of arrest to be followed by one year's police supervision. The accused who was aged 28 had a previous conviction for a similar offence of theft in a dwelling house under section 380 of the Penal Code and was sentenced to 2 months' imprisonment by the Magistrate's Court Kuala Lumpur on January 15, 1981. The accused did not file a notice of appeal against sentence in the present case but I called for the records of proceedings before the Magistrate's Court, Rawang, after I received a letter from the accused's father who had complained that the sentence of two years' imprisonment to be followed by one year's police supervision was excessive in the circumstances of the case.